

NO. 43559-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON L. RAYGOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Beverly G. Grant, Judge

REPLY BRIEF

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A. ARGUMENT IN REPLY

1. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

Aaron L. Raygor asserts trial counsel was ineffective for failing to object to a police officer's testimony informing the jury the suspect shown on photographs made from a store surveillance video was Raygor. Brief of Appellant (BOA) at 7-15. Raygor relies principally on this Court's decision in State v. George, 150 Wn. App. 110, 206 P.3d 697, review denied, 166 Wn.2d 1037 (2009).

In George, a surveillance system produced a poor quality video of a robbery. The trial court permitted a police officer who had participated in the suspects' arrest and saw them at a hospital and police station, respectively, to testify the video and still photos depicted the defendants as the robbers. 150 Wn. App. at 115. The officer could not make out facial features, but he identified the robbers by their builds, movements, clothing, and speaking with them later. The officer also testified the defendants looked similar at trial to the way they looked on the day of the crime. 150 Wn. App. at 115-16.

This Court held admission of the officer's identification testimony constituted an erroneous opinion by a lay witness. 150 Wn. App. at 118-19.

The State attempts to distinguish George, pointing out (1) the video and resulting still photos used in Raygor's case were not of such poor quality that Officer Filing could not recognize the suspect's face; (2) Filing recognized Raygor in the photos because he had arrested him; and (3) Filing did not testify he *thought* the suspect in the photos was Raygor because of his clothes or movement, but "was describing who he actually saw and recognized in the photographs." Brief of Respondent (BOR) at 10-11.

The State misses the point. First, police opinion testimony is more likely to be found helpful to the jury and therefore admissible where the evidence is of poor quality. BOA at 8-10. Second, the officer in George based his identification on his contacts with the two suspects when they were arrested and again at the hospital and police station, respectively. 150 Wn. App. at 119. This Court found the officer's contacts "do not support a finding that the officer knew enough about [the suspects] to express an opinion that they were the robbers shown on the very poor quality video." Id.

Officer Filing's contact with Raygor was less extensive than that of the officer in George. He interacted with Raygor only at the arrest scene. RP 85-89. He was therefore not in a position superior to a juror to identify Raygor as the suspect captured in the photographs.

Third, the officer in George did not testify he *thought* the defendants were the suspects in the robbery photos. Instead, he identified the men by their builds, the way they moved, and their clothing; in other words, what he actually saw and recognized in the photos. 150 Wn. App. at 115-16. Nor would that matter. The problem with the testimony in George, as well as in Raygor's case, is that the officer invaded the province of the jury by telling jurors the defendants were in the photos. 150 Wn. App. at 118, citing United States v. La Pierre, 998 F.2d 1460, 1465 (9th Cir. 1993).

In summary, the State's attempt to distinguish Raygor's case from George fails. George favors a finding that counsel performed deficiently by failing to object.

The State also asserts that Raygor failed to argue that the trial court would have sustained a timely objection to Filing's identification testimony. BOR at 12. This ignores the concluding statement in Argument section 1(c) of Raygor's opening brief: "The trial court would have sustained a timely objection to the evidence." BOA at 12.

Finally, the State claims Raygor fails to show that any deficient performance was prejudicial. BOR at 12-14. Raygor points this Court to Argument section 1(e) of his brief for his assertion he was indeed prejudiced. Notably, the prosecutor did not ask store manager Dillon

Tiger what the photographs depicted. RP 226-27. Only Filing identified the suspect in the photo as Raygor. And given his standing as a police officer, his testimony carried great weight.

For these reasons, this Court should reject the State's assertions, find Raygor was deprived of his right to effective assistance, and reverse his identity theft conviction.

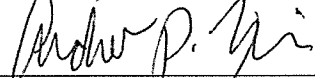
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, this Court should reverse Raygor's identity theft conviction and remand for a new trial.

DATED this 27 day of February, 2012.

Respectfully submitted,

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v.)	COA NO. 43559-4-II
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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF FEBRUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AARON RAYGOR
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 P.O. BOX 769
 CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF FEBRUARY 2013.

x 

NIELSEN, BROMAN & KOCH, PLLC

February 27, 2013 - 1:42 PM

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